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BEFORE THE  
**Federal Communications Commission**  
 WASHINGTON, D. C. 20554

In re	)	GC Docket No. 92-52
	)	
Reexamination of the Policy	)	RM-7739
Statement on Comparative	)	RM-7740
Broadcast Hearings	)	RM-7741

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TO: The Commission

JUL 22 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY**COMMENTS OF AMADOR S. BUSTOS**

Amador S. Bustos, by his attorney, hereby respectfully submits these Comments in response to the **Second Further Notice of Proposed Rulemaking** in the above-captioned matter, FCC 94-167, released June 22, 1994. In so doing, the following is shown:

**Preliminary Statement**

1. Mr. Bustos is a resident of El Dorado Hills, California. He is an individual applicant for a construction permit for a new FM Broadcast Station at Longmont, Colorado, File No. BPH-900228MB, MM Docket No. 90-424. Mr. Bustos' interest in this proceeding follows from this participation in the Commission's procedures.

2. Docket 90-424 involves the renewal application of FM Broadcast Station KQKS, Longmont, Colorado, whose

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licensee is controlled by Richard C. "Rick" Phalen. Mr. Bustos filed his application at Longmont in competition with the KQKS renewal application after Administrative Law Judge Walter C. Miller found that Rick Phalen was an undisclosed real-party-in-interest in an FM application at Montecito, California and urged the Commission to designate the KQKS renewal application for hearing. **Shawn Phalen**, 4 FCC Rcd 5714, nn. 10, 38 (1989). ALJ Miller's findings and conclusions relative to the Phalen family were affirmed by the Review Board. **Shawn Phalen**, 7 FCC Rcd 623 (Rev. Bd. 1992). Therein, the Board found that

Upon the facts at bar, Shawn Phalen has been, and was intended as no more, than a fantocine in her sire's guignol. [Rick Phalen] is either a, or the, real party in this Montecito application, beyond peradventure.

7 FCC Rcd at 625, ¶18.<sup>1</sup>

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<sup>1</sup> In the wake of the Review Board's damning decision against Rick Phalen, the Phalen application was dismissed in return for \$130,000 cash consideration pursuant to a settlement agreement filed with the Commission on June 17, 1992. **Shawn Phalen**, 7 FCC Rcd 7638 (1992). As a part of that order, the Commission vacated the findings and conclusions relating to Shawn Phalen and held that, since Rick Phalen was "not formally made a party to the Montecito proceeding", "the correctness of that underlying conclusion [that Rick Phalen was the undisclosed real party-in-interest] is not now before us for review". 7 FCC Rcd at 7639, ¶¶9, 12. The Commission did recognize, however, that the issue of Rick's involvement in Montecito was not washed out, but was to be tried in the Longmont case.

3. Despite the substantial and material grounds for denial of the KQKS renewal application, Docket 90-424 has turned into a morass of delay and frustration. The record in the Longmont proceeding was closed for the final time on April 6, 1993 (Docket 90-424, Tr. 3948); "Proposed Findings" were filed by the parties on May 28, 1993; and "Replies" filed by the parties on June 18, 1993. 47 U.S.C. §155(d) mandates that the Commission take such action "as many be necessary or appropriate to expedite the prompt and orderly conduct of the business of the Commission with the objective of rendering a final decision . . . within six months from the final date of the hearing in all hearing cases". Yet, for reasons known unto itself, the Office of Administrative Law Judges has failed to issue an "Initial Decision" within the prescribed six month period. Then, the Commission issued its order freezing comparative hearings. **Commission Freezes Comparative Hearings**, FCC 94-41, released February 25, 1994. Despite the fact that there are two basic qualifying issues pending against the incumbent licensee, no ruling on those issues has been made by the presiding ALJ, who is perfectly capable of ruling on those issues separate and apart from the comparative issues in the case.

4. This failure to issue an "Initial Decision" is violative of appellate precedents requiring the Commission to timely act on renewal applications and to forebear from providing benefits to licensees who are wrongdoers. For example, in **New South Media Corp. v. FCC**, 685 F.2d 708, 52

RR 2d 1 (D. C. Cir. 1982), the appellate court held that Commission procedures having the effect of indefinitely prolonging an incumbent licensee's "immunity from competitive challenge and comparative evaluation" violated Section 309(e)'s requirement that the Commission hold a "full hearing".

5. Every day that goes by without an "Initial Decision" violates Mr. Bustos' right to administrative due process. Every day that goes by without resolution of Docket 90-424 violates Mr. Bustos civil rights as a Hispanic American.

6. This is the background for Mr. Bustos participation in this proceeding. Mr. Bustos has an abiding interest in the speedy adoption of a new "Policy Statement for Comparative Broadcast Hearings".

#### **Comparative Criteria**

7. The Commission recognizes in footnote 2 to the **Second Further Notice** that, pursuant to Pub. L. 103-121, 107 Stat. 1153 (Oct. 27, 1993), the above-captioned docket "will not occasion any diminution of the credit that minorities currently receive in comparative proceedings or otherwise weaken the Commission's commitment to expand minority ownership".

8. It is clear from **Bechtel v. FCC**, 10 F.3d 875 (D. C. Cir. 1993) that any comparative criteria which fails to give a leading edge to past broadcast experience is doomed to be regarded by the appellate court as arbitrary,

capricious and irrational. In **Bechtel**, the D. C. Circuit repeatedly questioned the Commission's reliance on factors other than the most obvious, past broadcast experience. Slip Op. at 12, 13, 17-18. Indeed, the court wrote as follows (Slip Op. At 17):

Although the Commission has argued that broadcast experience should be "of minor significance" because it can come with time, **1965 Policy Statement**, 1 FCC 2d at 396, it is hard to imagine that anyone seriously interested in "picking winners" would so heavily downgrade the contestants' track records.

9. Although the Commission has typically viewed broadcasting as a "license to print money", that is no longer the case. Radio is a tough business. Indeed, in the Longmont case, "Rick" Phalen has made a business decision to "LMA" station KQKS to Century Broadcasting Corporation, which now programs KQKS and sells its advertising time. It requires an experienced broadcaster to (1)ensure that the station is placed in operation at an early date and (2)have the knowledge and savvy required to earn the survival of a fledgling station. Put another way, it makes no sense to have comparative hearing criteria which does not give the highest regard and credit to past broadcast experience.

10. Indeed, past broadcast experience is far more important than past local residence. Although knowledge about a community's problems, needs and interests is important, such knowledge can be obtained a whole lot quicker than knowledge, experience and savvy in the broadcasting business.

11. Therefore, Bustos believes that, with respect to the criterion "best practicable service to the public", minority ownership and past broadcast experience should be the most important criteria; these criteria should be equal in importance. Of lesser importance should be past local residence and past civic activities.

12. Additionally, the Commission should do away with its past practice of focusing on voting ownership for the purpose of assessing credit. As the Commission is well aware, gamesmanship has given way to "shamsmanship". Applicants have abused the system by proposing that individuals with 10 or fewer percent ownership should be accorded 100 percent integration credit. In some cases, the gambit worked. See e.g. **Independent Masters, Ltd.**, 104 FCC 2d 178, 187-92 (Rev. Bd. 1986), cited in **Bechtel**, Slip Op. at 14. In other cases, the sham was detected. See e.g.

**Marlin Broadcasting of Central Florida, Inc.**, 4 FCC Rcd 7945, 67 RR 2d 159, 171-173 (§§33-41) (Rev. Bd. 1990); **Metroplex Communications, Inc. (WHYI-FM)**, 4 FCC Rcd 8149, 67 RR 2d 185, 197-204 (§§43-62) (Rev. Bd. 1990). In **Metroplex**, the Review Board extensively remarked on a "cynical attempt" (§43) to turn a 4.0% equity interest into 100% integration credit, which the Board called a "mummery" and "an attempted subversion of our comparative process" (§62).

13. Bustos therefore urges that comparative credit henceforth be granted according to an individual's equity interest in the applicant, not according to an individual's voting interest in the applicant. Further, if an individual is found to have no financial stake in an applicant (or a financial interest not commensurate to his or her equity position in the applicant), his or her applicant should receive no comparative credit for that person's participation in the application. Thus, somebody with a \$100 investment for a 10% stake in an applicant for a facility which would cost \$1,000,000 to build would receive no comparative credit. This is wholly consistent with the Court's rationale in **Bechtel**, Slip Op. at 14-18.

**Conclusion**

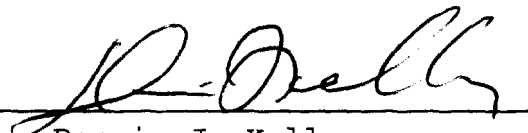
14. In light of the foregoing, the Commission will come up with a comparative formula which will serve (1) the public's expectation that new broadcast service will be provided by qualified, experienced broadcasters, (2) the policy goal of expanding minority ownership, and (3) the appellate court's expectation that the Commission will follow the unanimous decision in **Bechtel**.

**WHEREFORE**, Amador S. Bustos urges that the Commission resolve the above-entitled matter in accordance with the foregoing comments.

Respectfully submitted,

**AMADOR S. BUSTOS**

By



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July 22, 1994



**CERTIFICATE OF SERVICE**

It is hereby certified that true copies of the foregoing "Comments of Amador S. Bustos" were served by first-class United States mail, postage prepaid, on this 22nd day of July, 1994, upon the following:

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